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No.

IN THE

Supreme Court Of The United States

October Term, 1994

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL NO. 441

Petitioner,

vs.

INTERSTATE BRANDS CORPORATION, MERITA BREAD DIVISION,

Respondent.

PETITION FOR WRIT OF CERTIORARI OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GEORGE C. LONGSHORE, ESQ.
LONGSHORE, NAKAMURA & QUINN
Landmark Center, Suite 300
2100 First Avenue North
Birmingham, Alabama 35203
(205) 323-8504

Attorney for Petitioner

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QUESTIONS PRESENTED

1. Does a labor arbitration award fail to draw its essence from the contract, as the Court below found, entitling the losing party to a trial *de novo,* where both parties unreservedly submit to the arbitrator an issue requiring interpretation of federal regulation in order to determine whether the contractual standard of just cause for discharge has been met?

2. Is the Court below correct that a labor arbitrator engaged in interpreting federal law or regulation cannot possibly be involved in simultaneously interpreting the collective bargaining agreement?

3. Is the arbitrator "arguably construing or applying the contract and acting within the scope of his authority" when he undertakes to decide just cause and the reasonable rights of the employees by reference to DOT regulations submitted to him for final and binding resolution? *Misco, Inc. v. Paperworkers,* 484 U.S. 29 (1987).

LIST OF PARTIES

The parties to the proceedings are:

Petitioner:

LOCAL NO. 411, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, ITS OFFICERS AND MEMBERS.

Respondent:

INTERSTATE BRANDS CORPORATION, MERITA BREAD DIVISION

Amicus Appearances:

THE UNITED STATES DEPARTMENT OF LABOR AND THE AMERICAN ASSOCIATION OF MEDICAL REVIEW OFFICERS

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OPINIONS BELOW

The decision and final judgment of the District Court enforcing the arbitration award is unreported. See App. C. The Order denying the motion to stay pending appeal is unreported. See App. D.

The decision of the Eleventh Circuit, the opinion sought to be reviewed, is reported. *IBC v. RWDSU,* 39 F.3d 1159 (11th Cir. 1994). App. A.

The Order denying the petition for rehearing is unreported. See App. B.

STATEMENT OF JURISDICTION

The Court of Appeal's decision, review of which is sought, was on December 14, 1994. A timely petition for rehearing was filed which was denied by Order of February 14, 1995. The Mandate issued on March 1, 1995.

The Court's jurisdiction to review a decision of the Court of Appeals is invoked pursuant to 28 U.S.C.A. § 1254(a).

The district court had jurisdiction under 29 U.S.C.A. § 185(a).

STATUTES INVOLVED

29 U.S.C.A. § 173(d) provides in pertinent part:

> Final judgment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

STATEMENT OF THE CASE

A. Procedural History

The company filed a complaint in district court seeking to hold unenforceable an arbitration award that reinstated a driver because of procedural defects in the chain

of custody. The district court enforced the award. App. C.

The Eleventh Circuit reversed. 39 F.3d 1159 (11th Cir. 1994). Although the only ground the employer relied on in district court and on appeal was that the award violated public policy, the Court of Appeals found instead that the award failed to draw its essence from the contract. App. A. The public policy issue went unreached. App. A-11, f.n. 4.

A petition for rehearing and for *en banc* consideration was denied by Order of February 14, 1995. App. B.

B. Statement of the Facts

The petitioner is a labor organization representing the employees at the respondent's Birmingham, Alabama bakery. The union and the employer are parties to a collective bargaining agreement containing the customary "just cause" proviso, providing for the reasonable rights of the employees, and providing for final and binding arbitration of grievances. App. E, A-20.

The parties agreed to employ the grievance and arbitration procedure to resolve " . . . any charge of violation of the Agreement, charge of discrimination, grievance *or dispute* . . . " Article XI. (emphasis added). App. G, A-31-33.

The employer's drivers are subject to Department of Transportation regulations prohibiting the use of certain drugs and establishing rules for the collection, handling and analysis of urine specimens. 49 C.F.R. Part 40. As part of the protection afforded to employees from improvident procedures the regulations contain a chain of custody requirement governing the handling and transportation of urine specimens from point of collection to final disposition. 49 CFR § 40.3; § 40.23; § 40.25(c). App. F.

Part 40 of the regulations requires that the "[h]andling and transportation of urine specimens from one

authorized individual or place to another shall always be accompanied through chain of custody procedures." § 40.25(c). A chain of custody form is to be used to maintain control and accountability from point of collection to final disposition. § 40.25(k). App. F, A-30.

The subsection concerning chain of custody ends by stating, or it did at the time of the grievance, that the date and purpose is to be documented on the form "each time a specimen is handled or transferred *and every individual in the chain shall be identified.*" *Id.* (Emphasis added). App. F, A-30,

In May, 1993 a grievance was filed protesting the discharge of a driver who allegedly tested positive for marijuana. The testimony at the arbitration hearing was not recorded or transcribed. All we have are the briefs, the exhibits and the award. To digress for a moment, it is critically important for the Court to understand that the Court of Appeals statement of the "facts" is taken entirely from **ex parte** affidavits and other evidence collected by the company post-hearing. It is also important to understand that none of the grounds employed by Judge Hill to vacate the award were advanced by the employer to the arbitrator.

Both parties to the arbitration consented to the introduction of the DOT regulations. Part 40 was made a joint exhibit. The employer did not make a reservation of rights concerning the DOT regulations.

In its brief, IBC had no comments to make respecting chain of custody except to insist that it was intact. That the term "authorized individuals" was not intended to include carriers or other transportation personnel was not an argument made known to the arbitrator. As written by the Department of Transportation, each time the specimen was transferred from one individual to another and was transferred from one place to another the chain of cus-

tody form was required to reflect that change. Sec. 40.25(k).

The arbitrator rejected the tests results because of a break in the chain of custody between the point of collection in Birmingham and the lab in Kansas. After noting the regulatory requirement that the handling, storage and transportation of specimens from one authorized individual to another be accomplished through chain of custody procedures, the arbitrator found no reference on the form to either storage at the collection point or to persons in the transportation chain.

Based on his reading of the regulations the arbitrator found the chain was broken by lack of reference on the form to storage and to transportation. "But what if overnight storage and one or two transportation exchanges intervened between the collection and the lab? Should not Form 502 reflect those changes in custody? This Arbitrator thinks so." App. E, A-27.

Because the test result was excluded from evidence, the effect was there was no proof of a violation. The district court upheld the award. App. C, A-17.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW REPRESENTS A THREAT TO LABOR ARBITRATION AS A MEANS OF RESOLVING LABOR DISPUTES PROMPTLY, INEXPENSIVELY AND WITH FINALITY. THE EMPLOYER UNRESERVEDLY SUBMITTED TO THE ARBITRATOR THE ISSUE OF COMPLIANCE WITH DOT REGULATIONS. THE EMPLOYER MADE NONE OF THE ARGUMENTS THE COURT BELOW LATER USED TO VACATE THE AWARD. THE COURT BELOW IGNORED THE ARBITRATION HEARING TO AFFORD THE EMPLOYER A TRIAL DE NOVO.

1. The Threat to Labor Arbitration

Over thirty-five years have passed since the Steelworker Trilogy established the legal framework of labor arbitra-

tion.[1] In spite of a struggle over the years to preserve the basic Trilogy principles, the system has continued to serve the parties reasonably well by affording a prompt and inexpensive means of resolving grievances. *Wallace v. C.A.B.,* 755 F.2d 861, 864 (11th Cir. 1985). The system, however, can only remain quick and inexpensive if it is final. If challenges are encouraged the system will inevitably fail.

Labor arbitration has also served the federal court system by keeping labor disputes out of court for the most part. The vessel, however, is beginning to leak and perhaps sink if the decision below is allowed to stand.

This may be an appropriate moment for the Court to review the changes intervening since 1960 in order to provide guidance to arbitrators, the parties and to the courts into the next century. We all know the standards to be applied where the contract is being interpreted; but what are the rules when "external law" is placed on the arbitration table? Is no deference due even when the parties make an unqualified submission? Is the employer entitled to construct a new record on appeal and obtain a new trial entirely without regard to what was done, and just as important, what was not done at the hearing?

The Trilogy made clear that "the question of interpretation of the collective bargaining agreement is a question for the arbitrator." *Enterprise Wheel,* 363 U.S. at 596. The Court then observed that it was "the arbitrator's construction which was bargained for . . . " The question now becomes whether the bargained for construction may extend to issues beyond the contract and still retain the essence of the contract?

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[1] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

2. The Threat of A New Source of Litigation

This case arises in the larger context of a federal docket filled to overflowing with an unmanageable mass of litigation, much of it employment related. In a study entitled the Long Range Plan For Federal Courts conducted by the Judicial Conference of the United States an apocalyptic future was predicted for the nation's federal court system unless changes are made. The potential of the decision below to encourage challenges to arbitration cannot be overstated. Just when the courts should be strengthening the means of voluntary dispute resolution along comes a decision with the promise of a new trial to disappointed losers.

A second feature which the decision below works against is the hope and expectation that such devices as compulsory arbitration can minimize the costs of litigation in employment disputes. This Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S.Ct. 1647 (1991), held that parties to an employment contract may use the Federal Arbitration Act's dispute resolution procedures in the context of claims under the ADEA. 29 U.S.C.A. § 621 *et seq.* That hopeful trend will suffer a set back if the decision below becomes precedential.

A third factor underscoring the importance of this case is the growing likelihood that laws governing employment will become involved in labor arbitration. Recent years have seen enactment of a tidal wave of laws governing family leave, laws requiring employee notification of impending plant shutdown, laws prohibiting discrimination because of disability or age in addition to an earlier generation of statutes protecting workers from discrimination because of race, religion, national origin, and sex.[2] For example, just since the effective date of ADA in

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[2]The employment laws referenced seriatim are the Family and Medical Leave Act, 29 U.S.C.A. § 2601 *et seq.*; The Worker Adjust-

1992, we find arbitrators often dealing with ADA issues in such cases as *City of Dearborn Heights,* 101 LA 809 (1993); *Clark County Sheriff's Dept.,* 102 LA 193 (1994); *Multi-Clean, Inc.,* 102 LA 463 (1993); *Thermo King Corp.,* 102 LA 612 (1993); and *Dina Graphics, Inc.,* 102 LA 947 (1994).

3. In Determining Just Cause The Arbitrator Interpreted Federal Regulations

The first question is whether the decision below correctly reasoned that if an arbitrator is construing federal regulation he cannot possibly be engaged in interpreting the contract. 39 F.3d p. 1162. The Eleventh Circuit found a complete dichotomy between the two: "what these procedures [the DOT drug tests] require is an issue wholly outside the scope of the collective bargaining agreement. The employee's claim that his test is not admissible is not, on its face, governed by the contract. The award, therefore, does not draw its essence from the contract, and we owe it no special deference." *Id.* at 1162. The Court should have said that no deference whatsoever is due.

In so holding the Court ignored the employer's agreement to submit to arbitration not only "any charge of violation of this Agreement" but also any "dispute." Art. 11.1. As was said in *Warrior & Gulf:* "[A]rbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not

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ment and Retaining Notification Act, 29 U.S.C.A. § 2101; the Americans With Disability Act, 42 U.S.C.A. § 12101 *et seq.*; the Age Discrimination In Employment Act, 29 U.S.C.A. § 621; the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e *et seq.* and later amendments. Earlier laws likely to become involved in the labor arbitration include the Fair Labor Standards Act, 29 U.S.C.A. § 201 *et seq.*; the Employee Retirement Income Security Act, 29 U.S.C.A. § 1001 *et seq.* and, of course, the National Labor Relations Act, 29 U.S.C.A. § 151 *et seq.*

agreed so to submit." 363 U.S. at 582. That well-known caveat implies that a party may by reason of its contract or by its conduct at the hearing submit extracontractual issues for final resolution. As we shall see *infra* the consequences of so doing may well bind the party.

The Opinion below reads as though neither party so much as mentioned the DOT regulations and that the arbitrator returned to his office where he independently happened on the regulations which he then thrust upon the unwary employer. Not so. Part 40 was not only an exhibit but a joint exhibit. The Court below should have, but did not, point out that the arguments it employed to vacate the award were not advanced by the employer at the hearing.

The union unsuccessfully attempted to argue that in interpreting the regulations the arbitrator was engaged in deciding the issue of just cause and the reasonable rights of employees by reference to DOT standards.[3] This seemed to be the teaching of *Misco*. The essence of the award is drawn from the just cause and the reasonable rights clauses. Had there been no contract with a limitation on the employer's right to discharge, there would have been no arbitration.

On the other hand, it is true that the arbitrator in *Misco* was not interpreting a federal law or regulation. He was, however, applying an evidentiary rule customarily

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[3]The Court of Appeals misstated the union's position as supposedly conceding that "the award was grounded in the facts and the regulations." *Id.* at 1162. In the union's brief to the arbitrator it was said that "the issues revolve around the concept of just cause and the reasonable rights of the employees' as expressed in Article 10.1." Record Excerpts, Ex. 4, p. 1 of the brief. The Court of Appeals brushed aside the arbitrator's statement of the issue in terms of the contractual standards of just cause and reasonable rights because he went on to state that "more specifically" the issue related to compliance with DOT standards. *Id.* at 1161.

employed in labor arbitration that the employer could justify the discharge only on those facts known at the time of termination. 484 U.S. at 39, f.n. 8. To the same extent the arbitrator in the case at bar was relying on the evidentiary rule known as chain of custody which is made a part of the DOT's standards. 29 C.F.R. § 40.3, § 40.23(a)(viii), § 40.25(c). Both arbitrators rejected proffered evidence.

It is not novel by any means that the courts will not review awards for purported legal errors. Indeed, in *Misco,* this Court reminded us that so long as the arbitrator is even "arguably" construing or applying the contract that the courts " . . . do not sit to hear claims of factual *or legal error* by an arbitrator as an appellate court does in reviewing decisions of lower courts." 484 U.S. at 38. (Emphasis added). Thus, this Court has anticipated the very issue prompted by the inability of the Court below to understand that the arbitrator drew his authority to interpret the regulations from the contract's just cause proviso and from the parties' submission.

If this set of facts does posit the issue found by the Court below then we have the next significant policy question for labor arbitration: where the parties submit to the arbitrator without reservation a question in which the issue of just cause requires an interpretation of federal regulation what defence is due the award? The court below says none. Is that conclusion, however, consistent with the general policy of promptness and finality with the least expense to the parties? And the question also arises whether an overcrowded federal docket needs another source of litigation to further clog the system?

4. A Party Is Bound By Its Presentation To The Arbitrator

It is well-known that arbitration is a matter of contract. A party cannot be forced to submit to arbitration any

dispute which it has not agreed so to submit. *John Wiley & Sons v. Livingston,* 376 U.S. 543 (1964). "However, because an arbitrator's jurisdiction is rooted in the agreement of the parties [citations omitted] the parties may agree to submit even the question of arbitrability to the arbitrator for decision." *George Day Const. Co. v. Carpenters,* 722 F.2d 147 (9th Cir. 1984). The Ninth Circuit went on to conclude that even a question of arbitrability, ordinarily one of the courts, may be submitted for binding resolution without later resort to the courts: "[c]onsent to grant the arbitrator such authority may be implied from the conduct of the parties in the arbitration setting." The Ninth Circuit concluded that the *Enterprise Wheel* standard of high deference applies where the parties submit the issue to the arbitrator without a reservation of rights by withholding the issue from the arbitrator or by first seeking a declaration of rights. *Id.* at 1473-4.

The Eleventh Circuit ignored its own precedent contained in Judge Rubin's thoughtful analysis in *Piggly Wiggly Warehouse v. Local No. 1,* 602 F.2d 134 (5th Cir. 1980). By reference to what issues are actually proffered to the arbitrator the Fifth Circuit acknowledged that the contractual definition of what disputes are subject to arbitration may be expanded where "there has been a clear demonstration that the parties contemplated it [submission of substantive arbitrability]." "In this case," the Fifth Circuit stated, "neither party questioned the arbitrability either of the disputes stated in the grievance or of the issues set forth in it: the entire grievance was presented to the arbitrator without reservation." There is nothing unfair about holding a party to the clear consequences of its conduct where both parties agree to be bound by the decision. *See also IBC v. Teamsters,* 909 F.2d 885, 890 (6th Cir. 1990) and *Vic Wertz Distributing Co. v. Teamsters,* 898 F.2d 1136 (6th Cir. 1990).

By the same token, should an employer submit a question of "external law" to the arbitrator for decision, the law is no longer external but intertwined with the contractual issue of just cause for discharge. That conference of authority undeniably roots the decision in the contract.

5. The Award Draws Its Essence From The Contractual Standard Of Just Cause

In cases where the court asserts a total lack of deference to the arbitrator's resolution of the issues the results are likely to be horrendous. From the outset the employer attacked the award in terms of a violation of public policy relying on such cases as *Delta Airlines v. ALPA,* 861 F.2d 665 (11th Cir. 1988) and *Exxon Shipping Co. v. Exxon Seaman's Union,* 993 F.2d 357 (3rd Cir. 1993), and, of course, *Misco, Inc. v. Paperworkers,* 484 U.S. 29 (1987).

The complaint filed in district court explicitly so stated. "The award is invalid as contrary to the well-defined public policy expressed in the Regulations, against allowing persons who have tested positive for marijuana to drive trucks." Record Excerpts, Ex. 1, p. 3. The case was briefed to the District Court and to the Court of Appeals on that ground alone.

The Court below deliberately misstated the union's position by declaring that "even the union concedes that the award was grounded on the facts and the regulations," (*Id.* at 1162) but ignoring the opening passage in the union's brief to the arbitrator in which it said that "[t]he issues revolve around the concept of just cause and the reasonable rights of the employees as expressed in Article 10.1." (Record Excerpts, Ex. 4, page of the Union's brief). The arbitrator made the same important finding in his discussion and award. App. E, A-24.

Because the Court below found the award was entitled to no deference whatsoever it did not matter that the employer made none of the arguments to the arbitrator the Eleventh Circuit employed to vacate the award. That the chain of custody form contained no reference to storage at the point of collection was later deemed unimportant because the Department of Transportation so stated post-award. 39 F.2d at 1163. After this grievance was decided DOT changed its regulations to read as is quoted at page 1163. App. A-8-9. Just how the arbitrator, in the absence of guidance from the employer or the DOT, was supposed to know all this is not at all clear. The arbitrator applied the regulations in a literal fashion which he had the discretion to do. The employer made no effort to explain to the arbitrator how the requirement that "every individual in the chain be identified" did not mean literally that.

The chain of custody form in question makes it appear that the specimen was released by the collector to the courier. That emphatically did not happen. The collector placed the specimen on a shelf in the clinic in an unprotected place but the form made no reference to storage. The arbitrator reached a correct or at least a permissible conclusion based on the contract, the testimony and the regulations presented to him. "The DOT guidelines require rejection of a specimen for any of several procedural errors including chain of custody." App. E, A-26-27. A procedural error can vitiate proffered evidence in court as well as arbitration. *Miranda v. Arizona,* 384 U.S. 436 (1966).

CONCLUSION

The decision below poses a critical and perhaps unanswered question as to the arbitrator's authority to decide issues of law or regulation when those issues are placed

on the table, as they increasingly are. The result reached by the Court below is not in the best interests of labor arbitration as an institution nor that of the federal courts.

Respectfully submitted,

George C. Longshore

George C. Longshore, Esq.

LONGSHORE, NAKAMURA & QUINN
Landmark Center, Suite 300
2100 First Avenue North
Birmingham, Alabama 35203
(205) 323-8504

APPENDIX

XI

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Appendix A

INTERSTATE BRANDS CORPORATION;
Merita Bread Bakery Division, Plaintiffs—
Counter—Defendants—Appellants,

v.

LOCAL 441 RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,
Defendant—Counter—Claimant—Appellee.

No. 94-6306.

United States Court of Appeals,
Eleventh Circuit.

Dec. 14, 1994

Appeal from the United States District Court for the Northern District of Alabama.

Before BLACK and BARKETT, Circuit Judges, and HILL, Senior Circuit Judge.

HILL, Senior Circuit Judge:

In this case we review the district court's grant of summary judgement to appellee ("the Union") and enforcement of an arbitration award ordering appellant ("Merita") to reinstate unconditionally a truck driver who had tested positive for drugs. Merita argues that the arbitration award incorrectly interprets the Department of Transportation regulations regarding chain of custody requirements for the drug tests. We agree, reverse the district court's judgment, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Merita is a bakery in Birmingham, Alabama which ships substantial quantities of bakery products directly to customers in Mississippi, Tennessee, and Georgia. The Union represents employees of the bakery, including the truck drivers who deliver the bakery goods. Merita employed Willard Hamrick as an interstate truck driver subject to all the rules and regulations of the Department of Transportation ("DOT"), binding upon the labor contract between Merita and the Union.

In May of 1993, Hamrick was informed by his supervisor that he was due for a biennial physical examination which included DOT mandated drug-testing. At the appointed time, Hamrick presented himself for the physical and drug testing. The collector who took the urine specimen filled out the prescribed DOT Control and Custody Form, and Hamrick signed the form on the blank acknowledging that it was his specimen.

Hamrick put his initials on the adhesive, tamper-proof bottle seal which the collector signed and dated. The collector peeled the seal off the top copy of the DOT form and placed it over the specimen bottle cap, with the label parts running down opposite sides of the bottle. She placed the bottle in a plastic bag which has an adhesive edge exposed by peeling off a paper strip, and a plastic pocket for the Control and Custody Form.

After the collector completed and signed the entries certifying that she collected the specimen and prepared it for shipment in accordance with the DOT regulations, including its release by her to the courier for shipment to the laboratory, she peeled the adhesive box seal off the top copy of the DOT form, folded up five[1] copies of the form and inserted them in the pocket of the plastic bag

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[1] She gave one copy of the form to Hamrick, and kept another for her files.

into which she had placed the specimen bottle. She removed the paper strip from the plastic bag and pressed the bag's adhesive surface against the other side of the opening so that the bag could not be opened without cutting or tearing it. She placed the bag containing the bottle and five copies of the Control and Custody Form into the shipping box, sealed the edge of the box, signed the seal, and dated it, and placed the box on a shelf in her immediate working area — a laboratory from which members of the public are excluded — to await pickup by the courier. The bottle seal, the box seal, and each of the seven copies of this carbonless manifold Control and Custody Form have printed on them a unique specimen number. There is no dispute that DOT regulations require all of these actions, and that they were performed.

The Federal Express courier picked the box up at his regular time that day. He did not sign the Control and Custody Form because it was sealed inside the bag containing the specimen which was sealed inside the shipping box.

The box arrived the next day at the testing laboratory with all seals intact, and without any evidence of tampering. The next entry on the Control and Custody Form shows its receipt by the laboratory for "testing." Section 40.29(a)(1) requires that:

> When a shipment of specimens is received, laboratory personnel shall inspect each package for evidence of possible tampering and compare information on specimen bottles within each package to the information on the accompanying chain of custody forms. Any direct evidence of tampering or discrepancies in the information on specimen bottles and the employer's chain of custody forms attached to the shipment shall be immediately reported to the employer and shall be noted on the laboratory's

> chain of custody form which shall accompany the specimen while they are in the laboratory's possession.

There was no suggestion that anyone had tampered with Hamrick's specimen.

II. THE AWARD

Although the arbitrator framed the issue in terms of "the reasonable rights of the employees" as expressed in the contract, he immediately went on to state the issue "more specifically" as "... whether the urine test ... meets the criteria of the Department of Transportation standards and, if so, whether the penalty of discharge is appropriate under the Company drug policy?"

The arbitrator did not find any fault with the collection site or the laboratory procedures.[2] He held that DOT regulation 40.25(c) requires a chain of custody in the handling of a specimen, and that there was a break in the chain in this case. He based this conclusion on the failure of the collector to note on the Control and Custody Form that she put the box in "storage" when she placed the box on her out-box shelf, and because the Control and Custody Form did not identify nor have the signature of the courier who picked it up, nor of the individuals who handled the box between the collection site and the testing laboratory. He wrote:

> ... [T]he chain of custody form contains no reference to storage. The form purports to show that the donor released the sample to the collector who released it to an unidentified courier but without a reference to storage. A second

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[2]The arbitrator specifically found the collection site procedures were neither sloppy nor haphazard as the Union had alleged. He also found the collection site personnel to be "adequately trained."

> unidentified courier picked up the sample in Milwaukee for transport to the lab where it was received by [the lab technician]. . . .
>
> The above shows that there is a break in the links of the chain of [custody] *sic.* between the collector, the couriers, and [the laboratory technician]. The chain of custody form is designed "for maintaining control and accountability of each specimen from the point of collection to final disposition of the specimen. The date and purpose shall be documented on the for each time a specimen is handled or transferred and *every individual in the chain shall be identified.* Every effort shall be made to minimize the number of persons handling specimens." (Emphasis supplied) § 40.26(k).

The arbitrator concluded that "[t]he errors shown on the face of the Custody Form here have the cumulative weight of voiding the specimen," and he excluded it from the arbitration.

III. THE STANDARD OF REVIEW

Our review of an arbitration award is very limited. As reiterated in *United States Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 36-37, 108 S.Ct. 364, 370, 98 L.Ed.2d 286 (1987):

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judg-

> ment, when it was his judgment and all that it connotes that was bargained for." (quoting *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-68, 80 S.Ct. 1343, 1346, 4 L.Ed.2d 1403 (1960)).

We do not reconsider the merits of the award if it is argued that the award rests on errors of fact or on a misinterpretation of the contract.

> To resolve disputes about the application of a collective bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.

Misco, 484 U.S. at 38, 108 S.Ct. at 370-71.

Nonetheless, the deference due the arbitrator's award does not include blanket approval of all arbitration awards. Where the award does not draw its essence from the contract, but rather reflects the arbitrator's "own brand of industrial justice," the reviewing court need not defer to the arbitrator's conclusions. *Misco,* 484 U.S. at 36, 108 S.Ct. at 369 (quoting *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960)).

In this case, the arbitrator went beyond the collective bargaining agreement and undertook to interpret the DOT regulations requiring a "chain of custody": for the specimen. The arbitrator resolved the issue of the admissibility of the drug test without reference to the contract at all. His analysis was confined to the DOT regulations and his interpretation of them. Even the Union concedes

that the award was grounded "in the facts and the regulations."

In looking to the regulations, the arbitrator acknowledged that it is DOT, not the contract, which mandates drug testing for interstate truck drivers. It is DOT which has established the protocol for this program. What these procedures require is an issue wholly outside the scope of the collective bargaining agreement. The employee's claim that his test is not admissible is not, on its face, governed by the contract. The award, therefore, does not draw its essence from the contract, and we owe it no special deference.

IV. ANALYSIS

The issue then is whether the arbitrator is correct that Section 40.25(k) requires the signature of each and every individual who handles the sealed shipping box between the collection site and the testing laboratory before the specimen inside that box is admissible against the employee.

The problem with this interpretation of the regulation is that it is not shared by the DOT. Merita maintains, and there has been no suggestion to the contrary by the Union, that DOT has never interpreted its regulations to require that couriers, postal employees, and other intervening personnel involved in the transportation of urine specimens make chain of custody entries. Merita points out that such entries are impossible to make because the forms upon which they would be made are sealed inside a plastic bag with the specimen which is then sealed inside the shipping box. DOT requires signatures from only those persons who actually handle the specimen itself, rather than merely the sealed shipping box. Persons involved in transporting the box contenting the specimen are not considered to be in the chain of custody.

In its amicus curiae brief, DOT states that it has never required a signature from every individual involved in the transportation of specimens because it has regarded the tamper-evident seals on the bottle and shipping box to be the guarantors of the integrity of the specimen. Any tampering with the specimen after collection and before testing would be revealed by the broken seals. Replacement of the seals is not possible given their unique number which corresponds to that on the Custody and Control Form. According to DOT, its consistent interpretation of its regulations has been that the chain of custody documentation is required only at the collection site and at the testing laboratory where the specimens are vulnerable to tampering.

DOT has recently amended Section 40.25(c) to make its requirements clear:

> (c) Chain of Custody. The chain of custody block of the drug testing custody and control form shall be properly executed by authorized collection site personnel upon receipt of specimens. Handling and transportation of urine specimens from one authorized individual or place to another shall always be accomplished through chain of custody procedures. *Since specimens and documentation are sealed in shipping containers that would indicate any tampering during transit to the laboratory and couriers, express carriers, and postal service personnel do not have access to the chain of custody forms, there is no requirement that such personnel document chain of custody for the shipping container during transit. Nor is there any requirement that there be a chain of custody entry when a specimen which is sealed in such a shipping container is put into or taken out of secure storage at the collection site prior to pickup by such personnel. This means that the chain of custody is not broken, and a test shall not be canceled, because couriers, express*

> *couriers, postal service personnel, or similar persons involved solely with the transportation of a specimen to a laboratory, have not documented their participation in the chain of custody documentation or because the chain of custody does not contain entries related to putting the specimen into or removing it from secure temporary storage at the collection site.* Every effort shall be made to minimize the number of persons handling specimens. (emphasis supplied)

In the accompany commentary, DOT notes that the previous language of Section 40.25(k) directs that "every individual in the chain" be identified. DOT points out, however, that:

> Unlike authorized collection site and laboratory personnel, who actually handle the specimen, intervening transportation personnel are not, properly speaking, "in the chain" at all, a point which the Department has understood to be consistent with longstanding case law in a variety of contexts. Consequently, the Department never understood or intended this language to require that intervening transportation personnel make chain of custody entries.

Similarly, DOT states that it has never required the notation on the Control and Custody Form of a specimen's placement into secure temporary storage. In fact, once the specimen bottle has been sealed inside the plastic bag, and the bag sealed inside the shipping container, there is no way that such an entry could be made on the Custody and Control Form. Section 40.25(f)(25) requires sealing the specimen inside a shipping box for mailing as the guarantor of its integrity after collection and prior to testing.

We owe substantial deference to an agency's interpretation of its own regulation. *Thomas Jefferson University v. Shalala*, ___ U.S. ___, ___, 114 S.Ct. 2381,2386, 129

L.Ed.2d 405 (1994). *See also Martin v. Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 150-51, 111 S.Ct. 1171, 1175-76, 113 L.Ed.2d 117 (1991); *Lyng v. Payne,* 476 U.S. 926, 939, 106 S.Ct. 2333, 2341, 90 L.Ed.2d 921 (1986); *Udall v. Tallman,* 380 U.S. 1, 16-17, 85 S.Ct. 792, 801-02, 13 L.Ed.2d 616 (1965). "Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *Id.,* (quoting *Bowles v. Seminole Rock Co.,* 325 U.S. 410, 414-15, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)).

DOT's construction of its custody and control regulation is reasonable in view of its requirement that the Custody and Control Forms be sealed within the shipping container. In fact, it is difficult to see how DOT's regulations could be construed in any other way without rendering them nonsensical. The regulations' language and structure demonstrate that it applies chain of custody documentation requirements only at the collection site, and at the laboratory. Only at these two places does anyone have access to a urine sample that is not securely sealed. Evidence of tampering with the uniquely numbered seals after proper sealing of the specimen invalidates the test; not the absence of signatures in transit.[3]

Furthermore, the language requiring the signatures from those in the "chain of custody" must be read in the context of the longstanding case law in a variety of con-

---

[3]We note DOT's recent clarification of its regulations regarding the chain of custody requirements for specimens temporarily placed in secure storage and then mailed. This should avoid litigation along these lines in the future. We do not rely on these amendments — made after and apparently in response to the arbitration here involved — to reach the conclusion that the arbitrator incorrectly construed the DOT regulations in excluding the drug test from the arbitration.

texts that the mailing of evidence does not, without more, interrupt a chain of custody. See, e.g., Pasadena Research Laboratory v. United States, 169 F.2d 375, 380-81 (9th Cir. 1948), cert. denied, 335 U.S. 853, 69 S.Ct. 83, 93 L.Ed. 401 (1948); Rosedale Coal Co. v. U.S. Bureau of Mines, 247 F.2d 299 (4th Cir. 1957); Gallego v. United States, 276 F.2d 914 (9th Cir. 1960).

For the foregoing reasons, we reverse the district court's judgment and remand for further proceedings consistent with this opinion.[4]

REVERSED and REMANDED.

---

[4]Because we hold that the arbitrator misapplied DOT regulations in excluding the positive drug test and the arbitration award must be set aside, we need not address whether the award violates a dominant and well-defined public policy.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-6306

INTERSTATE BRANDS CORPORATION;
MERITA BREAD BAKERY DIVISION,

Plaintiffs-Counter-Defendants- Appellants,

versus

LOCAL 441 RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,

Defendant-Counter-Claimant-Appellee.

On Appeal from the United State District Court for the Norther District of Birmingham

---

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: BLACK and BARKETT, Circuit Judges, HILL, Senior Circuit Judge.

PER CURIAM:

(√) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court Having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing EN BANC are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black

UNITED STATES CIRCUIT JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

INTERSTATE BRANDS CORPORATION, MERITA BREAD BAKERY DIVISION,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION
LOCAL 441 RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,	)	CV 93-L-2694-S
Defendant.	)	
LOCAL 441 RETAIL, WHOLESALE AND DEPARTMENT STORE UNION,	)	
Counter-claimant,	)	
vs.	)	
INTERSTATE BRANDS CORPORATION,	)	
Counter-defendant.	)	

FINAL JUDGMENT

This cause, coming on to be heard at a regular motion docket in Birmingham, Alabama, on March 4, 1994, was submitted upon defendant's motion for summary judgment and plaintiff's cross-motion for summary judgment.

Upon consideration of the submissions and oral arguments of counsel, the Court concluded that there is no genuine issue of material fact and that the defendant is entitled to judgment as a matter of law.

It is therefore ORDERED, ADJUDGED and DECREED by the Court that the defendant's motion for summary judgment be and the same is hereby granted; that the award of the arbitrator, George V. Eyraud, dated December 16, 1993, be and the same is hereby enforced, and that the plaintiff, Interstate Brands Corporation, Merita Bread Bakery Division, be and the same is hereby enjoined to reinstate Willard "Chuck" Hamrick in his former job with back pay, each party to bear its own costs.

DONE this 31st day of March, 1994.

/s/ Seybourn H. Lynne
SENIOR JUDGE

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

INTERSTATE BRANDS CORPORATION, MERITA BREAD BAKERY DIVISION,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION
LOCAL 441 RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,	)	CV 93-L-2694-S
Defendant.	)	
LOCAL 441 RETAIL, WHOLESALE AND DEPARTMENT STORE UNION,	)	
Counter-claimant,	)	
vs.	)	
INTERSTATE BRANDS CORPORATION,	)	
Counter-defendant.	)	

ORDER

On motion of plaintiff-counterclaim defendant for an order suspending and staying the mandatory injunction embodied in the judgment of the Court in the above-captioned case on March 31, 1994, after hearing oral

arguments of counsel for the respective parties, the Court declines a stay pending appeal.

At oral argument on cross-motions for summary judgment on March 4, 1994, counsel for plaintiff invited the Court's attention to an unauthenticated letter from Douglas Lamar Allen, Jr., of the United States Department of Transportation, dated February 17, 1994, which contains the following language:

> An arbitration award ordering job reinstatement of a "covered" truck driver could be binding on the employer but it does not relieve the employee or employer of requirements to meet medical qualification standards for drivers returning to duty after a positive drug test under FHWA regulations.

The arbitrator proposed the following issue:

> Whether the urine test of May 25, 1993, meets the criteria of the Department of Transportation's standards and "if so, whether the penalty of discharge is appropriate under the company drug policy?"

The arbitrator found that the transportation of the urine sample from St. Vincent's Occupational Health Clinic in Birmingham to the laboratory in Kansas City violated the requirement of proof of the chain of custody of such specimen.

The arbitrator concluded that there was no proof of a positive urine test to support discharge of the grievant. The Court adopts such holding as its own.

At oral argument on the pending motion the Court was informed that the covered employee, Willard "Chuck" Hamrick, has performed duty as a truck driver for a different employer but at substantially reduced pay that he has not been provided health insurance at the

expense of his present employer. Of course, the award of back pay is to be mitigated by the amounts earned from other employment following his discharge, as the arbitrator held.

DONE this 15th day of April, 1994.

/s/ Seybourn H. Lynne
SENIOR JUDGE

Appendix E

ARBITRATOR'S REPORT AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN:	)	
INTERSTATE BRANDS CORPORATION, MERITA BAKERY,	)	
Company,	)	
and	)	GRIEVANCE OF FMCS: 93-21961
RETAIL, WHOLESALE, AND DEPARTMENT STORE UNION AND UNITED BAKERY WORKERS, LOCAL UNION NO. 441,	)	
Union.	)	

DATE:	December 16, 1993
ISSUE:	Job Termination
HEARING:	Birmingham, AL October 15, 1993
FOR THE COMPANY:	Clyde R. Burnett Director of Industrial Relations
FOR THE UNION:	George C. Longshore Attorney
ARBITRATOR:	George V. Eyraud, Jr.

GRIEVANCE

On June 3, 1993, the following grievance was filed:

> "Statement of Grievance: I was terminated without just cause."
>
> "Articles and Sections of Contract Alleged Violated: Article X and all other articles applicable."
>
> "Settlement Desired: Reinstated and made whole."

Pursuant to the Agreement between Interstate Brands, (hereinafter sometimes referred to as the "Company") and United Bakery Workers, (hereinafter sometimes referred to as the "Union"), George V. Eyraud, Jr. was appointed Arbitrator for the purpose of hearing and deciding a matter in dispute between them.

A hearing was held in Birmingham, Alabama on October 15, 1993.

PERTINENT CONTRACT PROVISIONS

The following is applicable to the arbitration:

> ARTICLE X — DISCIPLINE, DISCHARGE & TERMINATION
>
> 10.1 The power of discharge, discipline, and demotion lies with the Employer. It is agreed that this power shall be exercised with justice and with regard for the reasonable rights of the employees. If the Union, after investigation, feels that an employee has been discharged, disciplined or demoted without just cause and the complaint cannot be adjusted with the Employer, it may be the case to arbitration within five (5) days for final decision. If the case is decided in favor of the employee, such em-

ployee will be reinstated and paid for the time lost at his regular rate of pay, provided, however, the umpire shall have the discretion of requiring all, none, or only a portion of back pay.

D.O.T. REGULATIONS

"A collection site person shall have successfully completed training to carry out this function or shall be a licensed medical professional or technician who is provided instructions for collection under this part and certifies completion as required in this part," 49 C.F.R. Sec. 40.23(d)(2), at P. 570.

Sec. 391.15 Disqualification of Drivers

(a) General. A driver who is disqualified shall not drive a commercial motor vehicle. A motor carrier shall not require or permit a driver who is disqualified to drive a commercial motor vehicle.

Sec. 391.41 Physical qualifications for Drivers.

(b) A person is physically qualified to drive a motor vehicle if that person —

(12) Does not use a Schedule I drug or other substance identified in Appendix D to this subchapter, an amphetamine, narcotic, or any other habit-forming drug;

Sec. 391.95 Drug use prohibitions.

(a) No driver shall be on duty, as defined in Sec. 395.2 of this sub-chapter, if the driver uses any controlled substances, except as provided in Sec. 391.97 of this part.

(b) No driver shall be on duty, as defined in Sec. 995.2 of this sub-chapter, if the driver tests

positive for use of controlled substances, except as provided in Sec. 391.97 of this part.

(c) A person who tests positive for the use of a controlled substance as defined in 49 CFR Part 40, is medically unqualified to operate a commercial motor vehicle.

FACTS

The Company's Birmingham, Alabama Bakery ships bakery goods by a fleet of trucks on a regular basis to surrounding states.

Grievant, was employed as a tractor trailer driver for the company. As such, he (as was the company) was subject to all Department of Transportation (hereinafter sometimes referred to as D.O.T.) Regulations.

Recent D.O.T. Regulations require that interstate drivers undergo periodic drug screens designed to detect illegal substances. The company uses St. Vincent's Occupational Health Clinic, Birmingham, as the collection site for transport drivers' urine specimens.

Grievant's tests had all been negative until May 25 of 1993. While on vacation that week, Grievant's supervisor mentioned that a periodic drug screen would soon be necessary for him. Although not ordered to take the test, Grievant volunteered to take the test on his own time.

Clinical Reference Laboratory, NIDA certified, performed the test analysis for the presence of drugs in the specimen as submitted by Grievant. The test was positive. A Medical Review Office (MRO) who is a licensed physician, Dr. Bugarin, and who is charged with evaluating a confirmed positive test result, investigated and confirmed the result.

Dr. Bugarin then interviewed Grievant by telephone and determined that Grievant's statement of second

hand smoke at a concert would not invalidate the positive determination. Dr. Bugarin also determined that the chain of custody as required had been met. Accordingly, Dr. Bugarin reported the positive test result to the company.

The company then terminated Grievant in accord with company policy and in compliance with D.O.T. Regulations.

COMPANY POSITION

Grievant was terminated for just cause and according to the labor agreement.

The company is in the position of having its driver test positive for a controlled substance rendering him medically unfit to drive a company vehicle. The company could not knowingly allow Grievant to continue to drive.

The company has a long standing policy that the work place is to be drug free as well as an Employee Assistance Program. Employees found to be using drugs or alcohol before seeking such assistance are terminated.

The company complied with all D.O.T. Regulations.

Although allegations made against St. Vincent's Hospital need further investigation by the company, such allegations are not sufficient to declare the collection process invalid.

While one may question the validation of the process, it is not within the company's power to overturn the positive result of Grievant's test.

UNION POSITION

There was no just cause in the termination of Grievant.

The company's own policy is inconsistent and does not require discharge for a positive result.

Complete compliance with D.O.T. Regulations is required but was not met here.

The D.O.T. Regulations do not require the discharge of an employee except in cases of reportable accident nor does a positive test result in the loss of the commercial driver's license.

The integrity of the chain of custody was violated here.

The Arbitrator in assessing these facts should use the standard of proof "beyond a reasonable doubt."

Grievant's actions before and after testing are totally inconsistent with guilt.

Doubts regarding the validity of the test should be resolved in Grievant's favor.

DISCUSSION AND AWARD

The issues revolve around the concept of just cause and "the reasonable rights of the employees" as expressed in Article 10.1 of the Labor Agreement. More specifically, the issue is whether the urine test of May 25, 1993 meets the criteria of the Department of Transportation standards and, if so, whether the penalty of discharge is appropriate under the Company drug policy?

The Union argues that other Merita drivers had noted what appeared to be sloppy practices and irregularities among the personnel at St. Vincent's Occupational Health Clinic. Although the employees' complaints were voiced to management no effective remedial action resulted.

The Department of Transportation regulations require that the collection site personnel need to be trained in order to comply with the extensive and exacting regulations. However, the Union asserts that the collecting person here had no formal training and little or no informal training on the collection procedures required by DOT;

that she was an x-ray technician and appeared to be lacking in knowledge of DOT regulations as it relates to collection procedures.

Grievant testified that he was not asked to strip, to put on a gown or go through any of the preliminary formalities required by the regulations, §40.25; the collection site bathroom lacked bluing in the toilet. §40.25(f)(1); collection cups used in the collection process were placed on the back of the toilet, §40.25; no effort was made to provide opportunity for the donor to wash his hands, §40.25(a)(2); the kit was opened without the presence of the donor, §40.23(b)(1).

The Union argues that the protocol used by OHC is general in nature and is not intended to conform to DOT regulations. The Regs specify however that "collection site persons shall be provided with detailed, clear, instructions in the collection of specimens in compliance with this part." §40.23(d)(2)(ii).

Grievant testified that he was allowed to use a container found in the back of the commode even though the kit contains a container for that purpose. It was admitted that cups are kept on the back of the commode for use in other types of drug screens.

Suffice to say that the above arguments and evidence of the Union are not believed to be valid. Evidence of the Company was to the contrary. It is believed by this Arbitrator that St. Vincent's OHC procedures are not sloppy and haphazard with regard to the collection procedures. It is believed as well that collection personnel are adequately trained.

The chain of custody here is another matter. The chain of custody requirements form an important part of the regulations which are designed to ensure the integrity of the sample. "Handling and transportation of urine specimens from one authorized individual or place to

another shall always be accomplished through chain of custody procedures." §40.25(c).

The specimen in question was placed in storage before it was transported to the laboratory in Milwaukee. However, the chain of custody form contains no reference to storage. The form purports to show that the donor released the sample to the collector who released it to an unidentified courier but without a reference to storage. A second unidentified courier picked up the sample in Milwaukee for transport to the lab where it was received by one Anna Metzier on May 26, 1993 (or as the testimony showed, Anna Metzier could have been the courier).

The above shows that there is a break in the links of the chain of between the collector, the courier, and Metzier. The chain of custody form is designed "for maintaining control and accountability of each specimen from the point of collection to final disposition of the specimen. The date and purpose shall be documented on the form each time a specimen is handled or transferred *and every individual in the chain* shall be identified. Every effort shall be made to minimize the number of persons handling specimens." (Emphasis supplied) §40.26(k). §40.29(9)(2) states "Laboratories shall use chain of custody procedures to maintain control and accountability of specimens from receipt through completion of testing, reporting of results *during storage, and continuing until final disposition of specimens.*" (emphasis added). However, the specimen is unaccounted for in terms of its storage at St. Vincent's thru receipt by Metzier (if indeed Metzier was the receiving party).

This Arbitrator, as urged by the Union, must employ a high standard of proof respecting the collection and chain of custody procedure surrounding this test. The DOT guidelines require rejection of a specimen for any of several procedural errors including chain of custody.

It is necessary that the entire procedure from collection, through the chain of procession to the lab be consistent with the Regulations in order to serve as evidence of a positive test. That was not met here. The proponent of the evidence must show fidelity to the procedure in order that the integrity be beyond doubt or question. That is the import of the DOT Regulations and Guidelines. Chain of custody is mentioned several times in the Regulations with emphasis always on entries "each time a specimen is handled or transferred and every individual in the chain shall be identified." §40.26(k).

Part 40 of 49 Code of Federal Regulations governs "procedures for transportation of work place drug testing programs." The definition of chain of custody speaks of a "procedure to account for the integrity of each urine sample specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen."

The aim of an unbroken chain of custody is to ensure that the sample could not be tampered with and must remove any question or doubt respecting the validity of the entire process of collection, storage and transportation. The errors shown on the face of the Custody Form here have the cumulative weight of voiding the specimen.

The guidelines speak of a minimum of two signatures but the reference to minimum suggests that more signatures are necessary to reflect successive changes for storage and transportation. If the specimen passes directly from the collector to the lab, then only two entries are necessary. But what if overnight storage and one or two transportation exchanges intervened between the collection and the lab? Should not Form 502 reflect those changes in custody? This Arbitrator thinks so.

The standard of proof of beyond a reasonable doubt is believed to be appropriate here.

The Company has the burden of proving the validity of the test from collection on to the MRO's notification. Unless the procedure is followed we cannot be certain that the specimen is that of the Grievant.

Grievant's willingness to volunteer for a sample while on vacation appears to the Arbitrator to be inconsistent with guilt. If Grievant was using any sort of drug, why would he volunteer on vacation to take the test? Such doubts and the doubts regarding the chain of custody of the test are resolved in the Grievant's favor.

Grievance sustained. Grievant is to be made whole in all regards including job reinstatement and pay, less all amounts earned or otherwise received since job termination.

/s/ George V. Eyraud, Jr.
George V. Eyraud, Jr.
Arbitrator

Mailed at
Birmingham, AL this
16th day of December, 1993

Appendix F

29 C.F.R. Part 40

PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG TESTING PROGRAMS

* * *

§ 40.3 Definitions.

For purposes of this part the following definitions apply:

* * *

Chain of custody. Procedures to account for the integrity of each urine specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen. These procedures shall require that an appropriate drug testing custody form (see § 40.23(a)) be used from time of collection to receipt by the laboratory and that upon receipt by the laboratory an appropriate laboratory chain of custody form(s) account(s) for the sample or sample aliquots within the laboratory.

* * *

§ 40.23 Preparing for testing.

The employer and certified laboratory shall develop and maintain a clear and well-documented procedure for collection, shipment, and accessioning of urine specimens under this part. Such a procedure shall include, at a minimum, the following:

* * *

(viii) A chain-of-custody block providing areas to enter the following information for each transfer of possession: Purpose of change; released by (signature/print name); received by (signature/print name); date. The words "Provide specimen for testing" and "DONOR" shall be preprinted in the initial spaces.

* * *

§ 40.25 Specimen collection procedures.

(3) If it is impractical to maintain continuous physical security of a collection site from the time the specimen is presented until the sealed mailer is transferred for shipment, the following minimum procedures shall apply. The specimen shall remain under the direct control of the collection site person from delivery to its being sealed in the mailer. The mailer shall be immediately mailed, maintained in secure storage, or remain until mailed under the personal control of the collection site person.

* * *

(c) *Chain of custody.* The chain of custody block of the drug testing custody and control form shall be properly executed by authorized collection site personnel upon receipt of specimens. Handling and transportation of urine specimens from one authorized individual or place to another shall always be accomplished through chain of custody procedures. Every effort shall be made to minimize the number of persons handling specimens.

* * *

(k) *Use of chain of custody forms.* A chain of custody form (and a laboratory internal chain of custody document, where applicable) shall be used for maintaining control and accountability of each specimen from the point of collection to final disposition of the specimen. The date and purpose shall be documented on the form each time a specimen is handled or transferred and every individual in the chain shall be identified. Every effort shall be made to minimize the number of persons handling specimens.

APPENDIX G

Excerpts from Collective Bargaining Agreement

AGREEMENT

This Agreement is severally made and entered into as of this 27th day of June, 1992, by and between the undersigned Interstate Brands Corporation (Merita Bakery) of Birmingham, Alabama (hereinafter referred to as the "Employer") and the Retail, Wholesale and Department Store Union affiliated with the AFL-CIO or its successor, and the United Bakery and Confectionery Workers Union Local # 441, (hereinafter referred to as the "Union").

. . .

ARTICLE XI — SETTLEMENT OF DISPUTES

11.1 It is agreed that should any charge of violation of this Agreement, charge of discrimination, grievance or dispute arise at any time, the matter must be brought up within five (5) days after the alleged occurrence. Such matter shall be settled in the following manner:

Step 1 Between the aggrieved employee and the foreman of the department involved, and if the employee is unable to settle his grievance at this point, he shall reduce it to writing.

Step 2 Between the employee and the members of the Grievance Committee designated by the Union, and the Superintendent and/or manager of the plant.

Step 3 Between the representative of the International Union and the representative of the Employer.

Step 4 In the event the dispute cannot be settled within ten (10) days after the matter has been

brought up, then either party may petition the Director of the Federal Mediation and Conciliation Service in Washington, D.C. for a panel of at least seven (7) names of arbitrators. In order to select an arbitrator from the panel, the Company and the Union shall alternately strike names from the list until one (1) name remains. This person whose name survives will serve as the arbitrator. While the above procedure is being pursued, the parties shall make every effort to select an impartial arbitrator by mutual agreement, and in event such efforts are unsuccessful, the arbitrator shall be selected by the process as indicated above. The decision of the arbitrator shall be final and binding, and shall be rendered as soon as possible. The salary and expenses of the arbitrator shall be shared equally by the Employer and the Union.

11.2 There shall be no stoppage of work by the Union or its members or lockouts by the Employer pending the hearing and determination of any dispute and conditions involved in the dispute shall remain the same during the hearing, and decision reached at any stage of the proceedings as herein provided shall be final and binding on both parties and shall not be subject to reopening except by mutual agreement.

11.3 The Grievance Committee shall consist of not less than three (3) or more than five (5) employees of the plant who shall serve without pay as may be required unless meeting or meetings are called at the request of the Employer for official acts of the Grievance Committee in which event they shall be paid by the Employer involved.

11.4 It is agreed by and between the parties hereto that there will be no concerted failure to report for work, cessation or interruption of work, slowdown, strike or picketing or lockout during the term of this agreement or during any period of time while negotiations are in progress between the parties hereto for the continuance or renewal of this Agreement.

11.5 The parties agree, as part of the consideration of this Agreement, that neither the International Union, the local union, nor any of its officers, agents, or members, shall be liable for damages for any of the acts set forth above, provided that the Union has not authorized such acts and that the Union cooperates in getting the employees to discontinue any of such acts and resume normal operations.

11.6 It is recognized that the Employer has the right to take disciplinary actions, including discharge, against any employee who engages in any such unauthorized act or acts.